In the Court of Appeals for the Second District of Texas

No. 02-19-00216-CR

Ex parte Tonya Couch	On Appeal from Tarrant County Criminal District Court Number Two Trial Court Cause No. CDC2-C009633-00

Brief for Appellant on Remand

Oral argument is requested.

Mark W. Bennett
TBN 00792970
Bennett & Bennett
917 Franklin Street
Fourth Floor
Houston, Texas 77002
Tel. 713.224.1747
Email MB@IVI3.com

Stephanie K. Patten
TBN 00784728
Law Office of Stephanie K. Patten
2101 Moneda
Fort Worth, Texas 76117
Tel. 817.348.0925
skp@stephaniekpatten.com

Counsel for Appellant
Tonya Couch

Table of Contents

Table of Contents 2

Index of Authorities 4

Argument 5

None of the cases the Court of Criminal Appeals mentioned in its opinion answer the question. 5

Ex parte Weise 6

Headrick v. State 6

Ex parte Matthews 6

Ex parte Ruby 7

In no case has the Court of Criminal Appeals held that a pretrial facial challenge to the constitutionality of a statute is not cognizable on habeas. 8

The Court of Criminal Appeals has granted habeas relief in other cases where the relief did not dispose of all charges 9

Ex parte Crisp 9

Ex parte Meyer 9

Ex parte Ellis 10

Ex parte Watkins 12

Ex parte Weise cited Crisp and Meyer approvingly. 13

Presiding Judge Keller's Dissent in Watkins 13

Facial-unconstitutionality challenges are outside the operation of the rule. 14

This is consistent with the law as it is understood. 16

This is the law as the Texas Legislature has written it. 17
This is sound policy. 18
The rule forces endurance of trial on unconstitutional statute 18
The rule encourages the State to file dubious charges. 20
The rule encourages dubious defense challenges. 21
The rule prevents review entirely. 22
Conclusion 23
Prayer for Relief 23
Certificate of Compliance 25
Certificate of Service 25

Index of Authorities

CASES

Ashe v. Swenson, 397 U.S. 436 (1970) 11

Ex parte Couch, 629 S.W.3d 217 (Tex. Crim. App. 2021) 4

Ex parte Crisp, 66 S.W.2d 944 (1983) ..... passim

Ex parte Ellis, 309 S.W.3d 71 (Tex. Crim. App. 2010) 9, 10, 15

Ex parte Matthews, 873 S.W.2d 40 (Tex. Crim. App. 1994) 5

Ex parte Meyer, 357 S.W.2d 754 (Tex. Crim. App. 1962) ..... passim

Ex parte Perry, 483 S.W.3d 884 (Tex. Crim. App. 2016) 15, 17

Ex parte Ruby, 403 S.W.2d 129 (Tex. Crim. App. 1966) ..... passim

Ex parte Watkins, 73 S.W.3d 264, 266 (Tex. Crim. App. 2002) ... passim

Ex parte Weise, 55 S.W.3d 617 (Tex. Crim. App. 2001) ..... passim

Headrick v. State, 988 S.W.2d 226 (Tex. Crim. App. 1999) 5, 7, 13

Rubenstein v. State, 407 S.W.2d 793, 794 (Tex. Crim. App. 1966) 6, 7

STATUTES

Tex. Code Crim. Pro. Ann. art. 11.072 17

Tex. Code Crim. Proc. art. 11.01 16

Argument

The Court of Criminal Appeals has remanded this case for this Court to address the cognizability of Appellant's claim that a portion of the money laundering statute with which she is charged is an unconstitutional thought crime. *Ex parte Couch*, 629 S.W.3d 217 (Tex. Crim. App. 2021) ("Opinion Above").

The short answer is that, regardless of "immediate release," a facial-unconstitutionality challenge is cognizable on habeas.

Ms. Couch's claim is cognizable because its resolution in Appellant's favor will result in Appellant's immediate relief *from prosecution under the unconstitutional portion of the statute*.

None of the cases the Court of Criminal Appeals mentioned in its opinion answer the question.

In its opinion raising the question of cognizability, the Court of Criminal Appeals cites *Ex parte Weise*, 55 S.W.3d 617 (Tex. Crim. App. 2001) for the proposition that:

> A pretrial writ application is not appropriate when resolution of the question presented, even if resolved in favor of the applicant, would not result in immediate release.

Opinion Above at 217.

Ex parte Weise

Ex parte Weise is a 2001 case challenging the constitutionality of an illegal dumping statute *as applied* to the defendant. *Weise* cites *Ex parte Ruby*, *Headrick v. State*, and *Ex parte Matthews* for the proposition, "a pretrial writ application is not appropriate when resolution of the question presented, even if resolved in favor of the applicant, would not result in immediate release." *Weise*, 55 S.W.3d at 619.

Headrick v. State

Headrick v. State is a 1999 appeal of a denial of a pretrial writ raising the issue of collateral estoppel. *Headrick v. State*, 988 S.W.2d 226 (Tex. Crim. App. 1999). Without discussion, *Headrick* relies only upon *Ex parte Ruby* for the proposition that "Habeas corpus is not appropriate where resolution of the question presented, even if resolved in favor of the applicant, would not result in immediate release." *Id.* at 228.

Ex parte Matthews

Ex parte Matthews is a 1994 case in which the petitioner challenged the constitutionality of the statute-of-limitations-tolling statute. It appears not to address the question of cognizability where resolution does not result in immediate release. *Ex parte Matthews*, 873 S.W.2d 40 (Tex. Crim. App. 1994).

Ex parte Ruby

Ex parte Ruby, then, is the sole source for the proposition that "The writ of habeas corpus is not available to secure a judicial determination of any question which, even if determined in the prisoner's favor, could not result in his immediate discharge." *Ruby*, 403 S.W.2d at 130 (Tex. Crim. App. 1966). *Ruby* offered neither rationale nor authority for this proposition.

Ruby involved a post-conviction writ raising the question, "which of many lawyers should be recognized by this Court as appellant's counsel on appeal," *Rubenstein v. State*, 407 S.W.2d 793, 794 (Tex. Crim. App. 1966), while Jack Ruby's conviction and sentence of death for murdering Lee Harvey Oswald were already on direct appeal to the Court of Criminal Appeals. *Ruby*, 403 S.W.2d 129.

From *Ruby* and *Rubenstein* we learn that someone filed a habeas petition on Ruby's behalf to determine whether Joe Tonahill should be permitted to represent him on appeal; Ruby stated a preference that Tonahill not be so permitted, but Tonahill contended that Ruby was presently "insane," by which he meant incompetent to make that decision. While the Court of Criminal Appeals in *Ruby* did not answer the ultimate question, it granted some relief:

> In view of this, we entered an order directing the trial court to hold a hearing to determine whether or not appellant had become insane since his trial and thereby rendered incapable of rationally selecting his counsel.

Rubenstein, 407 S.W.2d at 794.

Perhaps the trial court would have done this even without the Court of Criminal Appeals's order—"Judge Holland has indicated his readiness to impanel a jury and determine the question of appellant's present sanity or insanity," *Ruby*, 403 S.W.2d at 130—but it cannot be said that the Court of Criminal Appeals denied relief.

In no case has the Court of Criminal Appeals held that a pretrial facial challenge to the constitutionality of a statute is not cognizable on habeas.

Neither *Weise*, *Ruby*, nor *Headrick* involves a pretrial facial challenge to the constitutionality of a statute. Such a challenge is outside the ambit of the alleged rule.

Nor do *Weise*, *Ruby*, and *Headrick* define "immediate release." The question of whether "immediate release" includes "immediate release on one, but not all charges" was not at issue in these cases: in these cases, resolution of the issues raised in the writ in favor of the defendant would not result in immediate release of the defendant on *any* charge.

Appellant has found no example of the Court of Criminal Appeals or any other court holding that a facial unconstitutionality challenge to one charge is not cognizable for pretrial review simply because it may not terminate prosecution for every charge contained in the same instrument.

The Court of Criminal Appeals has granted habeas relief in other cases where the relief did not dispose of all charges.

There are, however, at least four cases in which the Court of Criminal Appeals granted habeas relief, despite such relief not terminating all charges.

Ex parte Crisp

In *Ex parte Crisp* the Court of Criminal Appeals held that the statute under which the petitioners were being prosecuted was unconstitutional, but ordered that they "remain in the custody of the Fayette County Sheriff to stand trial under the proper law." *Ex parte Crisp*, 66 S.W.2d 944 (1983).

Ex parte Meyer

In *Ex parte Meyer* the Court of Criminal Appeals granted relief, holding that the statute under which the petitioner was charged was void, even though he was not entitled to discharge because another statute covered

the conduct described in the indictment. *Ex parte Meyer*, 357 S.W.2d 754 (Tex. Crim. App. 1962).

Ex parte Ellis

In *Ex parte Ellis* the Court of Criminal Appeals found that Ellis's[1] and Colyandro's[2] purported facial constitutional challenges to the money laundering statute were actually as-applied challenges and therefore, not cognizable *and* that the facial constitutional challenges to the provisions of the Election Code with which they were *also* charged were cognizable, but those provisions were not facially unconstitutional. *Ex parte Ellis*, 309 S.W.3d 71 (Tex. Crim. App. 2010). The Court determined that the petitioners' challenges to the money laundering statute were not cognizable because their challenges were in actuality as-applied challenges, and while pretrial habeas can be used to bring a

---

[1] Ellis asserted challenges in pretrial writs to the money laundering statute that he was charged with violating in 2 of the 5 indictments pending against him. He successfully challenged the conspiracy to violate Election code provisions charges in pretrial motions to quash in 3 of the 5 indictments pending against him.

[2] Colyandro challenged in pretrial writs the Election code provisions that he was charged with violating in 13 of the 18 indictments pending against him. He also challenged in pretrial writs the money laundering statute that he was charged with violating in 2 of the 18 indictments pending against him. He successfully challenged the conspiracy to violate Election code provisions charges in pretrial motions to quash in 3 of the 18 indictments pending against him.

facial constitutionality challenge to a statute, it may not be used in as-applied challenges. *Id*. at 79.

Although the Court specifically addressed the issue of cognizability by finding the as-applied constitutional challenges not cognizable and the facial constitutional challenges cognizable, the Court never mentioned that there is also a requirement that for facial constitutional challenges to be cognizable, resolution in favor of the petitioners must result in immediate release. Indeed, resolution of the challenges to the money-laundering statute in favor of petitioners would *not* have resulted in petitioners' immediate release, as petitioners would continue to be held not only on the election-code violations, but also on the additional money-laundering and election code indictments that the petitioners had not challenged by pretrial writs, and so were not the subject of the *Ellis* opinion.[3]

---

[3]*See State v. Ellis*, No. 904151 (331st Dist. Ct., Travis County, Tex. September 13, 2005), No. 904157 (331st Dist. Ct., Travis County, Tex. September 28, 2005), and No. 904160 (331st Dist. Ct., Travis County, Tex. October 3, 2005); and *State v. Colyandro*, No. 904150 (331st Dist. Ct., Travis County, Tex. September 13, 2005), No. 904156 (331st Dist. Ct., Travis County, Tex. September 28, 2005), and No. 904159 (331st Dist. Ct., Travis County, Tex. October 3, 2005).

As Presiding Judge Keller acknowledged in *Ellis*, a facial constitutionality challenge to a statute under the First Amendment need not show that the statute is unconstitutional in all of its applications. *Id*. at 80. The overbreadth doctrine allows the accused to benefit from the statute's unlawful application to someone else.

Ex parte Watkins

In 2002's *Ex parte Watkins* the Court of Criminal Appeals considered the State's appeal of a habeas petition challenging, based on collateral estoppel, the relitigation of the issue of sudden passion, "though it does not preclude the State from prosecuting the charged offenses." *Ex parte Watkins*, 73 S.W.3d 264, 266 (Tex. Crim. App. 2002). The court found the issue cognizable, and affirmed the granting of habeas relief.

In *Watkins* the Court of Criminal Appeals distinguished an *Ashe v. Swenson*[4] claim—"the relitigation in a second trial of a specific fact that has been fully and finally decided in an earlier trial of the same event," *Ex parte Watkins*, 73 S.W.3d 264, 274 (Tex. Crim. App. 2002)—from the issues in *Weise* and *Ruby*. Thus even if there is a general rule that habeas

---

[4]*Ashe v. Swenson*, 397 U.S. 436, 443 (1970) ("when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the parties in any future lawsuit").

relief must result in immediate relief, there is at least one exception to the general rule.

Ex parte Weise cited Crisp and Meyer approvingly.

Before *Watkins* the Court of Criminal Appeals had cited *Crisp* and *Meyer* approvingly for the proposition,

> One exception [to the general rule that when there is a valid statute or ordinance under which a prosecution may be brought, habeas corpus is not available before trial to test the sufficiency of the complaint, information, or indictment] is when the applicant alleges that the statute under which he or she is prosecuted is unconstitutional on its face; consequently, there is no valid statute and the charging instrument is void.

Weise, 55 S.W.3d at 620. *Weise* is not directly on point: it involved, as discussed above at 6, an attempted *as-applied* challenge to a statute, not a facial challenge as in *Crisp* and *Meyer* and the present case. What is important about *Weise* is its approving citation of *Crisp* and *Meyer*, and that Presiding Judge Keller joined in it.

Presiding Judge Keller's Dissent in Watkins

In dissent in *Ex parte Watkins*, Presiding Judge Keller wrote, "We have *never* granted relief on a pretrial writ of habeas corpus in a form other than immediate release." *Watkins*, 73 S.W.3d at 276 (Keller, PJ, dissenting) (emphasis in original).

The Presiding Judge was aware of *Crisp* and *Meyer*: she had joined in the opinion in *Weise* a year before *Watkins*. How, then, can we rectify the Presiding Judge's assertion that the court had "*never* granted relief on a pretrial writ of habeas corpus in a form other than immediate release," with the fact that in *Crisp* and *Meyer* the court had granted relief in a form other than immediate total release?

Like the *Ashe v. Swenson* claim in Watkins, the facial unconstitutionality challenges in *Crisp* and *Meyer* must be outside the putative rule that the potential of immediate release is a prerequisite to cognizability.

Facial-unconstitutionality challenges are outside the operation of the rule.

In *Watkins* the Court of Criminal Appeals put collateral estoppel claims outside any rule that a habeas corpus claim is not cognizable unless it will result in immediate release: "The cases on which the dissent relies in arguing that … do not involve this type of double jeopardy or collateral estoppel claim." *Watkins*, 73 S.W.3d at 273.

Nor do the cases on which the dissent relied in *Watkins*— *Ex parte Weise*, *Ex parte Ruby*, and *Headrick v. State*—involve *this* type of facial-unconstitutionality claim.

The Court of Criminal Appeals has never held that a facial-unconstitutionality claim is not cognizable in habeas, and in fact has granted habeas corpus relief on such claims in a form other than immediate release at least twice. *Crisp* and *Meyer* demonstrate that a facial-unconstitutionality challenge is cognizable even if it will not result in "immediate release."[5] As does *Ellis*.

The Presiding Judge, in her *Watkins* dissent, noted that:

> Mandating an affirmative answer to the "sudden passion" issue does not impede the prosecution. The State is still entitled to prosecute appellant for attempted capital murder and attempted murder[.]

Watkins, 73 S.W.3d at 276 (Keller, PJ, dissenting). "The point of permitting a pretrial writ," the Presiding Judge wrote, "is to protect the defendant from being tried." *Id.* at 277 (Keller, PJ, dissenting).

As in *Crisp* and *Meyer*, in the present case, the granting of relief will "impede the prosecution" in a way that the prosecution was not impeded even in *Watkins*: The State will no longer be "entitled to prosecute" Ms. Couch on the theory that she merely *intended* to finance or invest.

---

[5] Alternatively, the relief granted in *Crisp* and *Meyer*—relief from only part of the charges against the petitioners—*was* "immediate release."

As in *Crisp* and *Meyer*, upholding Ms. Couch's facial-unconstitutionality claim will protect her from being tried on one theory, but will not protect her outright from being tried.

Even if the Presiding Judge's view in *Watkins* were to prevail, the current case is not in the same class of cases as *Watkins*. Instead, it is in the same class as *Crisp* and *Meyer*—if the Court of Criminal Appeals agrees with Ms. Couch, the State will still be able to try her, but not for *intending to finance or invest*.

THIS IS CONSISTENT WITH THE LAW AS IT IS UNDERSTOOD.

Neither this Court nor the parties thought that cognizability was an issue, perhaps because the issue raised here—facial unconstitutionality—is understood to be *always* cognizable. *See Ex parte Ellis*, 309 S.W.3d 71, (Tex. Crim. App. 2010) ("Pretrial habeas can be used to bring a facial challenge to the constitutionality of the statute that defines the offense"); *Ex parte Perry*, 483 S.W.3d 884, 896 (Tex. Crim. App. 2016) (facial constitutional challenges "are cognizable on pretrial habeas regardless of whether the particular constitutional right at issue would be effectively undermined if not vindicated prior to trial").

Facial unconstitutionality is always cognizable, because a favorable decision for the accused will always result in the accused's immediate relief from some constitutionally impermissible theory of prosecution.

If the Court of Criminal Appeals were to find that "intend to finance or invest" is an unconstitutionally impermissible thought-crime, this would preclude the State from litigating the question of whether Ms. Couch intended to finance or invest, but did not finance or invest, funds.

Because a decision in Ms. Couch's favor here would preclude the State from litigating a constitutionally prohibited issue, and reduce her risk, Ms. Couch's issue is cognizable.

This is the law as the Texas Legislature has written it.

> The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint.

Tex. Code Crim. Proc. art. 11.01. Specifically, habeas may be used to challenge the legal validity of conditions of community supervision, Tex. Code. Crim. Proc. art. 11.072, even though a challenge to conditions of community supervision will not result in immediate discharge.

In that specific instance, an application may not be filed "if the applicant could obtain the requested relief by means of an appeal," Tex. Code Crim. Pro. Ann. art. 11.072.

In the case of a facial challenge like the current one, though, the availability of relief by means of an appeal is not a bar to habeas relief. *See Perry,* 483 S.W.3d at 896 ("cognizable on pretrial habeas regardless of whether the particular constitutional right at issue would be effectively undermined if not vindicated prior to trial").

Article 11.072 shows that it is simply untrue that the possibility of immediate discharge is a precondition to cognizability in habeas.

This is sound policy.

The alternative to considering facial-unconstitutionality challenges in habeas regardless of whether relief requested will be complete discharge is allowing the State to take people to trial for constitutionally protected conduct, such as speech or thought, provided that it accuses them also of unprotected conduct.

The rule forces endurance of trial on unconstitutional statute

If the potential for immediate release were a requisite for the cognizability of a facial-unconstitutionality claim, the State could shield unconstitutional charges from pretrial challenge by charging a violation

of an unconstitutional statute along with a violation of a constitutional statute.

The State determines what charges are filed. If the rule were that, in order to be cognizable on habeas, the argument had to potentially dispose of all charges against the accused, the State could simply find a constitutionally uncontroversial (albeit petty or dubious) offense to charge the defendant with, thereby blocking a pretrial habeas attack on an unconstitutional statute. The State could then wait until trial to abandon the constitutionally sound offense, and the unconstitutional statute would evade pretrial review (and possibly, as discussed below, any review at all).

The pleadings in the current case suggest that the State doubts its "invest" and "finance" theories.

In the present case, if the State knew that it could prove "invest" or "finance," it could have simply abandoned "intended to invest" and "intended to finance" in the indictments, mooting Ms. Couch's habeas, rather than suffer this case being put into appellate orbit.

It could do so now, mooting this appeal.

But the State likely knows that "invest" and "finance" are factually dubious charges. This is suggested by the State's latest charging

instrument, in which the State specifies the conduct alleged: "by withdrawing funds in cash in the amount of $30,000 from JPMorgan to finance the travel of [Tonya Couch] and Ethan Couch to Mexico." (C.R. 21.) "Withdrawing" funds is not, in any ordinary meaning of the words, "financing" or "investing" them. If Ms. Couch had engaged in some conduct that amounted to "financing" or "investing" this $30,000, the State would have described that conduct, rather than "withdrawing … to finance" in the latest indictment.

The rule encourages the State to file dubious charges.

If "invest" and "finance" are factually dubious charges, and if this Court adopts a rule (contrary to *Crisp*, *Meyer*, *Watkins* and *Ellis*) that a facial challenge to some, but not all of the accusations against an accused is not cognizable in habeas, the State will have dodged constitutional review of a statute with a subterfuge.

This illustrates why such a rule would be bad public policy: it would encourage the State to engage in subterfuge to prevent pretrial litigation of the unconstitutionality of statutes.

Nobody should want parties to be forced to endure the expense of trial over facially unconstitutional charges. Even the State ought to prefer knowing before trial whether a statute is constitutional. It is for

this reason that practicing lawyers' understanding of the law—as evidenced by the fact that neither the State nor this Court questioned cognizability in this case on initial submission—has long been that a facial challenge is cognizable, regardless of whether it would dispose of all of the charges against the accused, or only some.

The rule encourages dubious defense challenges.

Requiring the favorable resolution of facial constitutional challenges in pretrial writs to result in complete discharge on all charges before it is cognizable would also encourage dubious defense challenges. If the only way to make a constitutional challenge cognizable is to challenge everything, competent counsel will simply find reasons—not frivolous; supported by good-faith arguments for the law to change—to challenge everything

It can't be the rule that if a defendant is charged with a clearly unconstitutional statute on its face and also a probably constitutional statute, as long as the defendant challenges every statute with which she is charged, she can get her claim considered pretrial, but if she brings the challenge only against the unconstitutional statute, she is barred.

The rule prevents review entirely.

Finally, if Ms. Couch's claim that the State has charged her with a thought crime is not cognizable in a pretrial writ, then this statute, and every other unconstitutional statute pled along with a constitutional offense, can evade review entirely. Because Ms. Couch is charged with both an unconstitutional thought-crime and a probably constitutional prohibition against money laundering, requiring resolution of Ms. Couch's challenges in her favor to result in complete release on all charges against her would require her to endure a trial on both the unconstitutional and constitutional money-laundering charge.

In this scenario, the jury charge will track the indictment and the jury will be instructed that it can convict her if she "finances or invests or intends to finance or invest funds…." There will be no definition of "intends to finance or invest" in the jury charge, so the jury will be left with their common understanding of its meaning. The verdict will be a general verdict—guilty or not guilty of money laundering as defined in the jury charge. The general verdict will not distinguish between guilty/not guilty of "financing or investing funds," and guilty/not guilty of "intending to finance or invest funds".

So, if she is found guilty of money laundering, she will have been found guilty of financing or investing funds or intending to finance or invest funds. Was she found guilty of the thought crime? Or was she found guilty of the constitutional offense of money laundering? It is a general verdict, so we do not know—we cannot know. Equally important, then, is *how does she ever show harm*? She could have been found guilty of the constitutional offense just as she could have been found guilty of the unconstitutional charge.

If Ms. Couch can't show harm and the harmless error doctrine prevents relief; and the pretrial writ review rule also prevents relief, then the statute evades review completely and Ms. Couch can be convicted of a thought crime without any remedy at all.

Conclusion

By the Court of Criminal Appeals's precedent and as a matter of public policy, a facial-unconstitutionality challenge to a statute is cognizable on habeas, even if it will not result in the petitioner's immediate release.

Prayer for Relief

For these reasons, Ms. Couch asks the Honorable Court of Appeals to find her claim challenging the facial constitutionality of a portion of Section 34.02 (a) (4) of the Texas Penal Code cognizable.

Respectfully submitted,

Stephanie K. Patten
SBN 00784728
2101 Moneda
Fort Worth, TX 76117
817.348.0925
skp@stephaniekpatten.com

Mark Bennett
SBN 00792970
Bennett & Bennett
917 Franklin Street, Fourth Floor
Houston, Texas 77002
713.224.1747
mb@ivi3.com

Counsel for Appellant Tonya Couch

Certificate of Compliance

According to Microsoft Word's word count, this brief contains 3,846 words, which does not include the: caption, identity of parties and counsel, table of contents, index of authorities, statement of the case, statement regarding oral argument, statement of issues presented, statement of facts, signature, certificate of service, and certificate of compliance.

Stephanie Patten

Stephanie K. Patten

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Appellant's Brief has been served on Andrea Jacobs at the Tarrant County District Attorney's Office through efile electronic service at coaappellatealerts@tarrantcountytx.gov on the same date as the clerk's file stamp.

Stephanie Patten

Stephanie K. Patten